84

[redacted]

In the Supreme Court

OF THE

UNITED STATES

October Term, 1909.

FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITTREN, and ANDREW EADIE,

Petitioners,

vs.

JOSEPH HAMMER, OTTO HALLA and B. SCHWARZ,

Defendants.

PETITION FOR WRIT OF CERTIORARI

Requiring the Circuit Court of Appeals for the Ninth Circuit to Certify to this Court for Its Review and Determination the Above Entitled Case, No. 1609, of the Docket of Said Court.

W. H. METSON,
J. C. CAMPBELL,
Attorneys for Petitioners.

THE JAMES H. BARRY CO.
1122-1124 Mission St.

SUMMARY.

Can a relocator defeat a prior, valid placer location partially vested in innocent purchasers, because the first locator afterwards becomes a deputy surveyor—and that in a possessory action to which the Government was not even indirectly a party, nor "office found" an issue? This question has never before been decided.

The decision of the Court of Appeals herein is adverse to the doctrine held by the Supreme Court of the United States in the Alien, the National Bank, Powers of Foreign Corporations, and Indian Reservation Act cases.

Were the United States indirectly a party to this action and for that reason "office found" applicable, even then a direct conflict of authority exists upon this exact principle between the Supreme Courts of Utah and Nevada, and this, therefore, is one of the cases wherein this Court issues certiorari, i. e., "the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a State." (Forsythe vs. Hammond, 166 U. S., p. 514.)

The Court of Appeals exceeded its jurisdiction in "intervening" the United States and enforcing "office found" in a possessory action where the United States was not a party; also in adding an additional penalty beyond the statutory one.

In the Supreme Court

OF THE

UNITED STATES

October Term, 190 .

FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITTREN, AND ANDREW EADIE,
Petitioners,

vs.

JOSEPH HAMMER, OTTO HALLA AND B. SCHWARZ,
Defendants.

PETITION FOR WRIT OF CERTIORARI

REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO CERTIFY TO THIS COURT FOR ITS REVIEW AND DETERMINATION THE ABOVE ENTITLED CASE, NO. 1609, OF THE DOCKET OF SAID COURT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Frank H. Waskey, Joseph M. Crabtree, J. Potter Whittren and Andrew Eadie respectfully represents:

That the facts as hereinafter set forth arose out of an action in ejectment to try the possessory title to certain mining ground, worth hundreds of thousands of dollars, as between your petitioners and the respondents; the decision of the Circuit Court of Appeals for the Ninth Circuit applied against innocent purchasers the doctrine of "office found," although the sovereign was *not* a party to the action.

This decision breaks new ground in the law, as it "intervenes" the government in an action where the latter is not a party. The decision is therefore contrary to the doctrine laid down by the Supreme Court of the United States in the alien cases, the National Bank cases and the Indian Reservation cases.

Your petitioners' rights are based upon a *valid* location made by a *duly* qualified locator, but the application of this doctrine of "office found" deprived your petitioners of all rights under this location by reason of the fact that the locator became a deputy mineral surveyor *after* the completion of his

location and had then innocently drawn in his lines, thereby excluding his first discovery hole.

The Circuit Court of Appeals stated that the question involved was a *very close and interesting one,* and made an order that the mandate be stayed so that your petitioners might have an opportunity to apply to this court for a Writ of Certiorari, and upon the filing of a bond in the sum of Fifty Thousand Dollars pending the application for said writ.

The principle involved has never been applied except in cases where the United States was a party, and even then the courts of last resort differ in their conclusions thereon.

The record shows that on January 2, 1902, J. Potter Whittren, one of your petitioners, a citizen of the United States and *then* a duly qualified locator, staked the "Bon Voyage" claim in the District of Alaska. He made a discovery, marked his boundaries and recorded a location notice (Tr., 59, 60, 61, 66). He then made a *valid* location.

A year later, in February, 1903, he became a Deputy Mineral Surveyor (Tr., 87). On November 11, 1903, he went on the ground to survey it and to do his assessment work. In the course of making the survey, he discovered that the claim was to the extent of a fraction of an acre, in excess of the statutory area; so he drew in the northwest and southwest corners in order to make his location conform to the law allowing a locator of a placer claim only twenty

acres. When Whittren moved in his northwest corner, the small hole in which he had discovered gold was left a few feet outside the lines of the claim. In December, 1903, while working on the claim, he again discovered gold (Tr., 87). At this time he was a deputy mineral surveyor.

On January 1, 1904, two years after the location of the "Bon Voyage" the respondents, Otto Halla and B. Schwarz, located the "Golden Bull Claim," which conflicted with the "Bon Voyage" claim (Tr., 54).

Whittren, in 1905, conveyed a half interest in the "Bon Voyage" to the petitioner, Andrew Eadie (Tr., 88), and in June, 1906, Whittren and Eadie made a lease to petitioners Waskey and Crabtree, Eadie also being interested with Waskey and Crabtree in such leases. These grantees were all *innocent* parties (Tr., 91). They had no knowledge of the disqualification of Whittren.

Your petitioners, Waskey, Crabtree and Eadie, proceeded to develop the property under said leases and defined the pay streak.

Thereupon, the respondents brought an action of ejectment against your petitioners, claiming to be the owners and entitled to the possession of the "Golden Bull" claim and alleging an ouster in June, 1906, when Waskey, Eadie and Crabtree had gone on the "Bon Voyage" under the leases mentioned.

Whittren and Eadie answered denying the allegations of the complaint and setting up that they were the owners of the "Bon Voyage," and Waskey and Crabtree their lessees.

Waskey and Crabtree answered denying all of the allegations of the complaint, and setting up affirmatively that Whittren and Eadie were the owners in fee of the disputed land under a valid location made by Whittren on January 1, 1902; that at the time of the location of the "Bon Voyage" it contained a trifle over 20 acres, but upon accurate survey made in November, 1903, Whittren had drawn in the lines to conform to the statutory area; alleged their interest under certain leases from Whittren and Eadie and their quiet, peaceable possession, mining and developing the same for gold.

The respondents in their reply denied all of the allegations of the answer and set up further that petitioners had forfeited the ground for a failure to perform the assessment work for the year 1903, and that when they located, the ground was for that reason, open.

No issue was raised as to the invalidity of the location of Whittren by reason of the exclusion of his discovery when he drew in his lines in November, 1903, or that when he made a second discovery in December, 1903, within his readjusted lines, he was disqualified to make a location by reason of being a

deputy mineral surveyor. The latter fact was disclosed during the trial.

At the close of the case, the plaintiffs (respondents herein) moved the court to direct a verdict for them on various grounds, one of which was the fact that on November 11, 1903, when Whittren had surveyed his claim, and with the intent to comply with the law, had drawn in his lines to exclude a small portion of an acre and thus conform to the statutory area—twenty acres—he had also excluded his discovery point; and although he made another discovery in December, 1903, he was then a deputy mineral surveyor and therefore disqualified to locate.

Upon that ground, the motion to direct a verdict in favor of the plaintiffs (respondents) was granted (Tr., 90-97). Thereafter the jury rendered a verdict in accordance with said motion.

Upon writ of error from the Circuit Court of Appeals, sued out by your petitioners, the judgment of the lower court, based upon said verdict, was affirmed. In affirming the judgment of the lower court the Circuit Court of Appeals treated the case as though it were an adverse patent proceeding with the United States a silent party thereto and held as follows:

That Whittren had made a valid location on January 1, 1902;

That he had a right in November, 1903, to draw

in his lines to make that location conform to the statutory area;

That when in so doing, he left his discovery outside, he lost one of the essential elements of his location.

That he made another discovery on his claim in December, 1903, and if he were not disqualified at that time, he would be entitled to the ground in controversy, as the respondents did not locate until January, 1904. But although he was a qualified and a prior locator, yet later he became a deputy mineral surveyor and was such at the time of this second discovery and he was therefore disqualified to make a location by reason of that fact. The Court holding that as such deputy mineral surveyor he came within the prohibitory provisions of Section 452 of the Revised Statutes of the United States.

Upon that ground, and without any issue having been made therein in the pleadings, in an ordinary action to try the *possessory right* to a mining claim as between two locators, wherein the United States was *not* a party, the Circuit Court of Appeals declared the location of Whittren *void*.

This is the first time in the history of mining law that the doctrine of "office found" has been applied to such an action.

Your petitioners contend that in so doing, the said Circuit Court of Appeals exceeded its jurisdiction.

It exceeded its jurisdiction in this:

(1) In treating an ordinary action in ejectment to try the mere possessory right to a mining claim as though the same were an adverse proceeding for patent in which the United States was a party and deciding in favor of the United States, although not a party to the action.

It exceeded its jurisdiction in this:

(2) In considering and deciding this case it ignored the fact that the United States *alone* had the power upon "office found" to question the right of the petitioner Whittren to make a location on the mineral lands of the United States.

It exceeded its jurisdiction in this:

(3) It proceeded to hear and determine the right of a deputy mineral surveyor to make a mineral location upon the public lands and to declare that he had no such right, in an ordinary action of ejectment instituted to decide the *possessory rights* of the parties, where no question was involved as to the ultimate right of either of the parties *to a patent* for the mining claim in controversy, and where there was no question of a purchase of the same.

It exceeded its jurisdiction in this:

(4) That to the penalty prescribed in Section 452 for a violation of its provisions, it added the further

penalty—that of holding the location made in violation of its provisions void; and this in an ordinary action to try the *possessory* title thereto, where the United States was not a party.

It exceeded its jurisdiction in this:

(5) That in so holding the location of the petitioner Whittren void, it failed to take cognizance of the rights of innocent parties who had purchased interests in said location, and who were entitled to protection.

It exceeded its jurisdiction in this:

(6) In holding that notwithstanding the prior location of your petitioner, Whittren, the location of the respondents, made two years later, should take precedence of the location of Whittren, because the latter was a deputy mineral surveyor when he made his second discovery, although such discovery was priod in time to *any* intervening rights; and this in an action where the United States was not a party.

It exceeded its jurisdiction in this:

(7) In holding that your petitioner, Whittren, as a deputy mineral surveyor, was an employe in the General Land Office and subject to the prohibitory provisions of the statute; and in holding a location made by him as such deputy mineral surveyor void, in an action wherein no question of right to a patent

was involved, and where no issue had been made that the location of Whittren was for that reason void.

I.

The provisions of Section 452 of the Revised Statutes of the United States, which the Circuit Court of Appeals found controlling in this case, are as follows:

> "The officers, clerks and employes in the General Land Office are prohibited from . . . *purchasing* or becoming interested in the purchase of any of the public lands; *and any person who violates this section shall forthwith be removed from his office.*"

It is the contention of your petitioners that the provisions of the statute do not deprive any one of the officers, clerks or employes in the General Land Office of the capacity or power to make a mineral location or to purchase the public lands. The section simply withdraws the right to exercise the statutory power to make a *purchase* of the public lands enjoyed by such persons in common with all other citizens of the United States, *while they hold such employment.* And especially provides as a penalty, that if any one of this class of individuals violates the statute in this respect, he shall "forthwith be removed from office." The statute does not state that any such purchase of the public lands shall be *void.*

But, if loss of employment, which is the only penalty in terms provided for by the statute, is not an exclusive penalty for the violation of its provisions, and the courts can go further and declare by way of construction that Congress intended a further penalty, your petitioners submit such further penalty can not be greater than to render a purchase of the public lands *voidable and not void,* and *voidable at the instance of the government alone on "office found."*

In such event, the proceeding in which the question is raised, must necessarily be one wherein the government of the United States is a party. No such condition existed in the case at bar.

If such is not the law, then a citizen of the United States is treated with far less consideration than is an alien. Under Section 452 of the Revised Statutes, an employe in the General Land Office can not *purchase;* while under Section 2319 of the Revised Statutes only citizens or those who have declared their intention to become such can *locate.*

And this court has settled the proposition that only the United States government can on "office found" question the validity of a location made by an alien.

McKinley Creek Min. Co. vs. *Alaska United M. Co.,* 183 U. S., 563;
Manuel vs. *Wulff,* 152 U. S., 505.

And its decision in this respect has been followed by the Circuit Courts of Appeal and the State Courts of last resort.

Shamel on Mining, Mineral and Geological Law, p. 108;
Morrison's Mining Rights, 13th Ed., p. 308;
Lindley on Mines & Mining, Vol. 1, Sec. 233;
Martin's Mining Law, Sec. 98;
Costigan on Mines, pp. 167-8;
Snyder on Mines, Sec. 263, and cases cited.

Further, under the ruling of the Circuit Court of Appeals herein, a location once made by a disqualified person in his own name or secretly in the name of another is void; this is so even in the hands of an innocent purchaser. Therefore, the title once bad is incurable throughout the chain of title, no matter how long such chain may be.

We further submit:

The principle controlling in the alien cases and which we contend is applicable in this case, has been adopted and applied by this court in a class of cases arising under the National Banking Act, where the National Banks have been held entitled to recover upon securities taken in the ordinary course of business but in violation of the express provisions of the Act of Congress creating them. In this line of cases, this court has uniformly held that such securities are

not void but voidable *and the sovereign alone can object thereto on "office found."*

National Bank vs. *Matthews,* 98 U. S., 621, 627;
Oates vs. *National Bank,* 100 U. S., 239, 249;
National Bank vs. *Whitney,* 103 U. S., 102-3;
Reynolds vs. *Bank,* 112 U. S., 405;
Schuyler National Bank vs. *Gadsen,* 191 U. S., 451.

The same principle is involved in another class of cases wherein by statute foreign corporations are forbidden to do business in a State unless they have complied with certain statutory requirements. This court has held in such cases that in the absence of a provision of the statute declaring contracts made in violation of such statute void, that *no one can question the validity thereof except the State upon a direct proceeding instituted for that purpose.*

Fritts vs. *Palmer,* 132 U. S., 282;
Seymour vs. *Slide,* 153 U. S., 523.

A similar principle is involved in another class of cases wherein corporations are authorized by State statutes to hold only a specified amount of real property in order to enable them to carry on business. This court has held that where a corporation violates the statute in this regard, no advantage of the fact can be taken by collateral proceedings on the part of

private individuals, *the matter being one of which the State alone can complain.*

Cowell vs. *Springs Co.*, 100 U. S., 55, 60;
Jones vs. *Habersham*, 107 U. S., 174;
Blair vs. *City of Chicago*, 201 U. S., 400, 450-1.

There is finally one other class of analogous cases involving the throwing open to occupation and entry by the citizens of the United States of certain public lands, the lands to become open to settlers on a certain day at a certain hour; and wherein the proclamation of the President declaring such lands open to settlement contains an express prohibition against any sooner entry thereon than at the hour and date specified in the proclamation, under penalty of loss of right to acquire *any rights* to said lands. Yet this court has upheld locations made by individuals who violated the express provisions of the statute by entering before the hour stated, and held that while the entry of one so disqualified was valid on its face, *no one but the government through its Land Department could question the entry.*

McMichael vs. *Murphy*, Vol. 197 U. S., 304;
Hodges vs. *Colcord*, 193 U. S., 192.

The principle laid down by this court in the foregoing classes of cases has been adopted as settled law and followed by numerous adjudications of the

courts of last resort involving analogous circumstances.

Weber vs. *Spokane, etc.*, 64 Fed., 208;
Sanders vs. *Thornton*, 97 Fed., 863;
Brown vs. *Schlerer*, 118 Fed., 987;
Blodgett vs. *Lanyon Zinc Co.*, 120 Fed., 893;
Waterbury vs. *McKinnon*, 146 Fed., 737-9;
Dunlap vs. *Mercer*, 156 Fed., 545;
Newchatel vs. *New York*, 49 N. E., 1043;
Ledebuhr vs. *Wisconsin Trust Co.*, 88 N. W., 607, 609;
Meyers vs. *Campbell*, 44 Atl. (N. J.), 863;
Camp vs. *Land*, 122 Cal., 167.

II.

Admit that the Circuit Court of Appeals was correct in its conclusions respecting a deputy mineral surveyor, coming within the purview of the language used in Section 452, and admit that the class of individuals mentioned therein are prohibited from exercising the right to make a purchase of the public lands while in the General Land Office, what is to be the effect of a violation of such prohibition as expressed in the statute? The same statute creating the offense provides in terms the punishment for its infraction.

"Any person who violates this section *shall forthwith be removed from office.*"

There is no provision that any such purchase shall *be void.*

The law is well settled that where a statute *creates a new offense* and *denounces the penalty* or gives a new right and declares the remedy, the punishment or the remedy can only be that which the statute prescribes.

Sutherland on Stat. Const., Sec. 327;
Endlich on Interpretation of Stats., Sec. 397;
Oates vs. *National Bank*, 100 U. S., 239, 249;
Fritts vs. *Palmer*, 132 U. S., 282;
Seymour vs. *Slide*, 153 U. S., 523;
Barnet vs. *National Bank*, 98 U. S., 558;
National Bank vs. *Whitney*, 103 U. S., 102-3;
National Bank vs. *Matthews*, 98 U. S., 621, 627;
DeWolf vs. *Johnson*, 10 Wheaton, 392;
Martin vs. *United States*, 168 Fed., 198, 201;
Pratt vs. *Short*, 79 N. Y., 437, 445;
Behan vs. *The People*, 17 N. Y., 517;
Bird vs. *Dennison*, 7 Cal., 308;
Perkins vs. *Thornburg*, 10 Cal., 190.

We submit the persons mentioned in Section 452 have a statutory right as individuals to purchase the public lands. They also have the right to accept employment in the General Land Office. But if they accept such employment, the right to exercise such

statutory power to purchase the public lands is withdrawn during such employment. If, however, they persist in exercising such power, in the light of the statute, then they must give up their employment.

The proposition is an alternative one. Congress says to these individuals, "you can retain your employ-
" ment, if you do not exercise your statutory right to
" purchase; but if you do exercise this right, then
" you know the consequences—loss of employment."

We submit this is the only reasonable construction of the statute and does not work so harsh a rule as has been invoked by the court in this case, i. e., loss of employment (the penalty which the statute prescribes), and loss of location at the same time.

> "On what principle can this Court add another to the penalties declared by the law itself?"
>
> *De Wolf* vs. *Johnson,* 10 Wheat., U. S., 392.

In this respect this case is similar in principle to the cases hereinbefore cited under the National Banking Acts and the foreign corporation acts, on the proposition of "office found," and wherein this court has held that action similar to that taken by the Circuit Court of Appeals in this case would be "an additional penalty added beyond those imposed by the law itself."

> *Oates* vs. *National Bank,* 100 U. S., 239, 249;
> *Fritts* vs. *Palmer,* 132 U. S., 282.

We therefore contend that the action of the Circuit Court of Appeals for the Ninth Circuit, in this case, viewed in the light of the foregoing authorities, is entirely unwarranted in law, being in conflict with the decisions of this court, with the decisions of the courts of appeal of the other circuits, with those of the courts of last resort of the States and with its own decisions. (*Webber* vs. *Spokane, etc.,* 64 Fed., 208; *Waterbury* vs. *McKinnon,* 146 Fed., 737-9.)

We believe the action of the Circuit Court of Appeals in thus exceeding its jurisdiction renders a review of the action of the lower court imperative in order to do complete justice as between the parties and that your petitioners may not be deprived of their property rights without due process of law.

The case is further one of peculiar hardship. The facts of the record show, and the Circuit Court of Appeals so found, that your petitioner, Whittren, made a valid location of the ground in the year 1902, slightly excessive in area, it is true, but which did not invalidate the location (*Richmond* vs. *Rose,* 114 U. S., 576; *Price* vs. *McIntosh,* 121 Fed., 716; *Zimmerman* vs. *Funchion,* 161 Fed., p. 859.) This at a time when he was not a deputy mineral surveyor.

In an honest endeavor to meet the requirements of the law, in surveying his ground a year later and finding it excessive, he drew in his lines to exclude about twenty feet of ground, and in doing so left outside a

little hole in which he had found gold on this placer ground.

In this connection it should be noted that the general mining laws alone are in force in Alaska, and therefore no discovery shaft or posted or recorded notice is required in that district unless by miners' custom, and no custom was shown herein. (*Book* vs. *Justice M. Co.*, 58 Fed., 106, 115; *Erwin* vs. *Perigo*, 93 Fed., 609; *Nevada Sierra Oil Co.* vs. *Home Oil Co.*, 98 Fed., 673; *Sturtevant* vs. *Vogel*, 167 Fed., 448.)

Whittren went ahead within his adjusted lines and did his assessment work, and again found gold. *At this time he was a deputy mineral surveyor. No rights had intervened.* His location was marked on the ground, a notice recorded since January 1, 1902, and a discovery made. He believed the property his and that he had acquired a legal right to the possession because he had to all intents and purposes made a valid location.

He made a conveyance of a half interest in the property to an *innocent* purchaser. He, with his cotenant, leased the property to your petitioners, Waskey and Crabtree (also innocent parties), so that it might be properly developed and the pay streak exploited. The pay streak was defined after the expenditure of much hard labor, time and money; and when the fruits of such labor were about ready to be enjoyed by your petitioners, the respondents insti-

tuted this action, basing their rights upon an adverse *later* discovery and location made in 1904.

No issue was made that the location of your petitioner was invalid by reason of the fact that Whittren was a deputy mineral surveyor when he shut out his old and made his new discovery. He had no chance to defend on the proposition that that matter was a question for the government on "office found." Upon a matter of evidence developed on the trial, taken advantage of by the respondents, and acted upon by the court below, a verdict was directed against him, when the whole record showed that he was entitled to the ground, unless he was disqualified to make the location.

We contended before the Circuit Court of Appeals that a deputy mineral surveyor did not come within the provisions of Section 452 of the Revised Statutes, in that he was neither an officer,

Hand vs. *Cook,* 92 Pac., 1;
U. S. vs. *Hartwell,* 6 Wall., 385;
U. S. vs. *Germaine,* 99 U. S., 508;
U. S. vs. *Mouatt,* 124 U. S., 303, 307;
U. S. vs. *Smith,* 124 U. S., 525, 532;
Martin vs. *U. S.,* 168 Fed., 198;

a clerk,

People vs. *Fire Comm.,* 73 N. Y., 437, 442;
People vs. *ex rel Satterlea* vs. *Board of Police Comm.,* 75 N. Y., 38;
Hand vs. *Cook, supra;*

nor an employe

McCluskey vs. *Cromwell*, 11 N. Y., 593;
U. S. vs. *Meigs*, 95 U. S., 748;
Ex parte Burdell, 32 Fed., 681;
Powell vs. *U. S.*, 60 Fed., 689, 690;
U. S. vs. *Macdonald*, 72 U. S., 898;
Louisville E. & St. L. R. Co. vs. *Wilson*, 138 U. S., 501, 505;
Auffmordt vs. *Hedden*, 137 U. S., 310;
Pack vs. *The Mayor, etc., of N. Y.*, 8 N. Y., 222;
Kelly vs. *The Mayor of N. Y.*, 11 N. Y., 432;
The People ex rel Peter Morris vs. *Randall*, 73 N. Y., 41;
Blake vs. *Ferris*, 5 N. Y., 58,

in the General Land Office.

We submit that the question of whether a deputy mineral surveyor comes within the provisions of Section 452, and is debarred from making a location upon the mineral lands of the United States is one wherein there is direct conflict of authority between the courts of last resort of the States of Nevada and of Utah and of the Circuit Court of Appeals for the Ninth Circuit in this case.

The Supreme Court of Utah, in the case of *Lavignino* vs. *Uhlig*, 71 Pac., 1047, in an *adverse patent* case, in which the United States is an ever present party, holds that a deputy mineral surveyor is dis-

qualified; while the case of *Hand* vs. *Cook*, 92 Pac., 1, holds that such an individual is not included within the terms "officers, clerks and employees" in the General Land Office.

In commenting upon the case of Lavignino vs. Uhlig, Professor Costigan, in a very recent work on *Mining Law*, sustains our view that the validity of such a location can only be questioned by the government and says (p. 170):

> "This is but a State decision, for the United States Supreme Court, when the case came before it, avoided the point by basing its decision on the ground that the land was not open to location. The whole tenor of the Utah decision is that the location by the deputy mineral surveyor is absolutely void, *whereas the protection of innocent purchasers requires that a rule like that applicable to locations by aliens be applied.* It is upon that ground only that a recent Nevada decision upholding a location by a deputy mineral surveyor can be supported. While the Court seems to have been in error in the last-mentioned case in saying that deputy United States mineral surveyors are not covered by the above-mentioned statute, *nobody but the government could possibly object to a location by a deputy mineral surveyor,* and the Court was therefore right in its decision, but erred in the reason given for it."

The case at bar is one in which the decision of the Circuit Court of Appeals is final, and also presents one of the conditions the existence of which influ-

ences this court in exercising the power of *certiorari* to review the action of the Circuit Courts of Appeal. While this court exercises that power but sparingly, it most frequently exercises it where there is a conflict of decision between the Federal Courts of Appeal and the courts of last resort of a State (*Forsythe* vs. *Hammond*, 166 U. S., 506), a condition clearly shown to exist here.

And the conditions in the case at bar are even more favorable for this court to take action by *certiorari*, by reason of the fact that an excess of jurisdiction is shown on the part of the Circuit Court of Appeals, in rendering a judgment in favor of the United States not a party to, and over which it had acquired no jurisdiction in the action, and against your petitioners, under circumstances of peculiar hardship to the latter.

We respectfully submit herewith a brief upon the law points involved.

Wherefore, your petitioners pray:

1. That the writ of *certiorari* be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and of all proceedings of the Circuit Court of Appeals in

the said case of *Frank H. Waskey et al.* vs. *Joseph Hammer et al.,* No. 1609, to the end that this cause may be reviewed as allowed by the statute of the United States in such case made and provided.

2. That your petitioner may have such other and further relief in the premises as to this court may seem appropriate and in conformity with law, and that the judgment of the said Circuit Court of Appeals herein may be reversed by this Honorable Court.

And your petitioners will ever pray, etc.

FRANK H. WASKEY,
JOSEPH M. CRABTREE,
J. POTTER WHITTREN,
ANDREW EADIE,
Petitioners.

W. H. METSON,
Their Attorney and Counsel.

W. H. METSON,
J. C. CAMPBELL,
Counsel for Petitioners.

CERTIFICATE OF COUNSEL.

We hereby certify that we have carefully examined the foregoing petition and application for writ of *certiorari,* and that in our opinion, the same is well

founded and that the case is one in which the prayer of the petitioners should be granted by the court.

W. H. METSON,

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Counsel for Petitioners.

To Attorneys for Respondent:

Please take notice that on Monday, the 11th day of October 1909, on the opening of court on that day, or as soon thereafter as the matter can be heard, we shall move the Supreme Court of the United States, at the court-room thereof, in the City of Washington, District of Columbia, that the foregoing petition for a writ of *certiorari* be granted.

Dated at San Francisco, this 4th day of June, 1909.

W. H. METSON,
J. C. CAMPBELL,
Counsel for Petitioners.

Service of the above and receipt of copy thereof, together with copy of the foregoing petition is hereby admitted at San Francisco, State of California, this 4th day of June, 1909.

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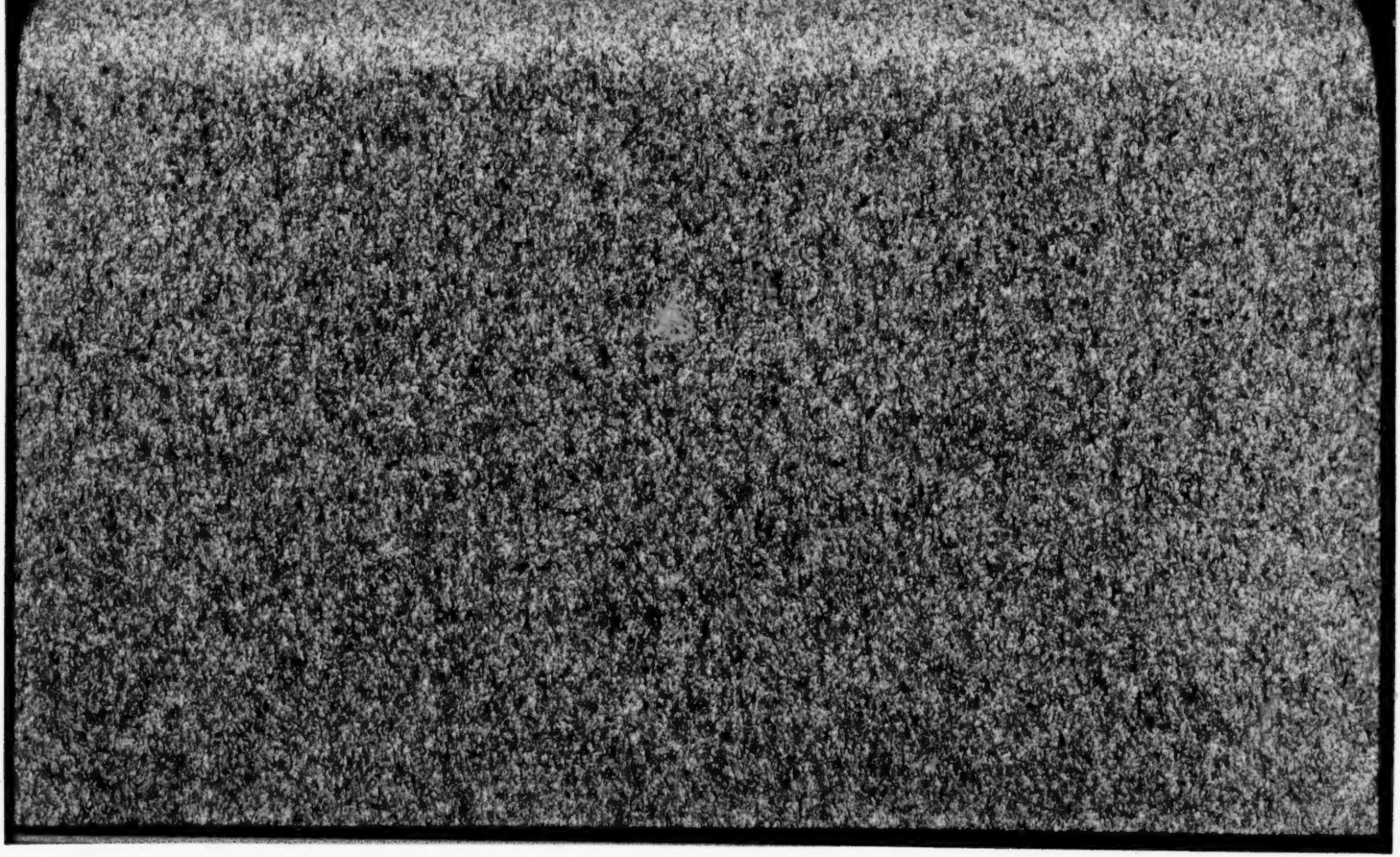
Attorneys for Respondent.

84

In the Supreme Court



INDEX.

SUMMARY.

Can a relocator defeat a prior, valid placer location partially vested in innocent purchasers, because the first locator afterwards becomes a deputy surveyor—and that in a possessory action to which the Government was not even indirectly a party, nor "office found" an issue? This question has never before been decided.

The decision of the Court of Appeals herein is adverse to the doctrine laid down by the Supreme Court of the United States in the Alien, the National Bank, Powers of Foreign Corporations, and Indian Reservation Act cases.

Were the United States indirectly a party to this action and for that reason "office found" applicable, still a direct conflict of authority would exist upon this exact principle between the Supreme Courts of Utah and Nevada, and this, therefore, is one of the cases wherein this Court issues certiorari, i. e., "the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a State." (Forsythe vs. Hammond, 166 U. S., p. 514.)

The Court of Appeals exceeded its jurisdiction in "intervening" the United States and enforcing "office found" in a possessory action where the United States was not a party; also in adding an additional penalty beyond the statutory one.

In the Supreme Court

OF THE

UNITED STATES

October Term.

FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITTREN, and ANDREW EADIE,
Petitioners,

vs.

JOSEPH HAMMER, OTTO HALLA and B. SCHWARZ,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This case presents a question of the exercise of powers beyond the jurisdiction of the Circuit Court of Appeals for the Ninth Circuit and Northern District of California; and is one wherein the judgment of the said Court is final unless reviewed by *certiorari.*

The Circuit Court of Appeals, in an action to try the possessory right to a placer mine situate in the

District of Alaska, wherein the United States was not a party, applied the doctrine of "office found" and declared the valid location of your petitioners void, although prior in time to that of respondents, on the ground that the locator had become disqualified to make a mineral location, under Section 452 of the Revised Statutes of the United States.

It so decided because after locating the ground, making a discovery, marking the boundaries and recording a location notice, the locator, finding that he had a small fraction of an acre too much, innocently drew in his lines a year later and thereby excluded his discovery, at a time when he had become a deputy mineral surveyor.

In so doing, the said Circuit Court of Appeals for the Ninth Circuit exceeded its jurisdiction in two respects.

(1.) It treated the case as though the United States was a party thereto, rendering a judgment in its favor although the action did not involve an inquest of office.

(2.) It imposed a penalty upon the petitioners herein other than that prescribed in the statute for its infraction.

To epitomize this case:

One Whittren, while a qualified locator, admittedly made a valid placer location. A year later he was appointed a deputy mineral surveyor. He still later drew in his lines slightly as he had a legal right to do and again discovered gold within his new markings. Then he conveyed to us. When we bought we had no knowledge of Whittren's office of deputy surveyor.

Our opponents "jumped" our mine. Assume them to have been aliens. The action was ejectment and the Government was not a party.

Our location was held invalidated because of Whittren's disqualification in becoming a deputy mineral surveyor.

Our alien opponents, under the doctrine laid down by Mr. Justice McKenna in Lone Jack vs. Megginson, affirmed in 82 Fed., 89, and again by the Supreme Court of the United States in McKinley Creek Mining Co. vs. Alaska United Mining Co., 183 U. S., 563, are not disqualified.

We have therefore this anomaly: an alien disqualification to locate does not disqualify; a citizen's disqualification does disqualify even against innocent purchasers. "Inquest of office" is thus applied in the same action against the citizen, but not against the alien.

From the face of a notice of location no one could tell the locator was an alien nor could it be known therefrom that the locator was a deputy surveyor. The principle of the de-

cision was necessarily dependent upon the status of the parties. The status of one is that of a citizen; that of the other an alien. Manifestly, such reasoning results in a flat contradiction and is illogical. Certainly it is opposed in principle to four lines of analogous cases decided by the Supreme Court of the United States.

The proceeding to declare a forfeiture by inquest of office is a privilege of the sovereign. But no governmental power would exercise its discretion to put in motion an inquest of office under the facts of this case.

We found the mine; we defined the boundaries of the pay streak deep in the ground under the ice of ages; we thawed portions of it and put the gravel on the surface after great hardship and at tremendous expense. We did no act that was not in conformity to the law. Simply because our locator innocently drew in his lines a year after the original location was made, but after he had become a deputy mineral surveyor our mine is given to people who merely looked on while we worked.

STATEMENT OF THE CASE.

The record shows that on January 2, 1902, J. Potter Whittren, then a duly qualified locator, staked the "Bon Voyage" claim in the Nome Recording District, District of Alaska. He made a discovery of gold, properly marked his boundaries, innocently including a small fraction over the statutory twenty acres, and posted and recorded a location notice (Tr., 59, 60, 61, 66).

On November 11, 1903, he went on the ground for the purpose of surveying his location and to do his assessment work. While making the survey, he discovered for the first time that the claim included a fraction over twenty acres, and then drew in his north and southwest corners so as to exclude the excess; in doing this, his first discovery hole was left a few feet outside the limits of his claim, as surveyed. In December, 1903, while working on the claim he found gold in another place (Tr., 87). At this time he was a deputy mineral surveyor. He became such deputy mineral surveyor a year after locating.

Two years after the completion of Whittren's location, or in January, 1904, the respondents, Otto Halla and B. Schwarz, located the "Golden Bull" mining claim, which overlapped the "Bon Voyage" (Tr., 54 and Exhibits, Tr., 49, 50).

Whittren conveyed a half interest in the "Bon Voy-

age" in the year 1905, to your petitioner, Andrew Eadie (Tr., 88).

In June, 1906, Whittren and Eadie joined in leasing the ground to your petitioners, Waskey and Crabtree. These grantees were all innocent parties (Tr., 91). They worked diligently under said leases, and defined the pay streak at a large expense of money, time and labor. Whereupon the respondents instituted the ejectment.

Whittren and Eadie answered denying the allegations of the complaint, and setting up that they were the owners of the "Bon Voyage" and that Waskey and Crabtree were their lessees.

Waskey and Crabtree answered denying all of the allegations of the complaint, and setting up affirmatively that Whittren and Eadie were the owners in fee of the disputed land under a valid location, made by Whittren on January 1, 1902; that at the time of the location of the "Bon Voyage" it contained a trifle over twenty acres, but upon accurate survey made in November, 1903, Whittren had drawn in his lines to conform to the statutory area; alleged their interest under certain leases from Whittren and Eadie and their quiet, peaceable possession, mining and developing the same for gold.

The respondents in their reply denied all of the allegations of the answer and set up further that your petitioners had forfeited the ground for a failure to do the assessment work for the year 1903, and that

when they located, the ground was for that reason open.

No issue was raised as to the invalidity of the "Bon Voyage" location by reason of Whittren being disqualified when he excluded his discovery in 1903, upon surveying his claim and drawing in his lines to conform to the law, or that he was so disqualified when he made his second discovery in December, 1903, within his readjusted lines. The latter fact was incidentally disclosed during the trial as a matter of evidence. At the close of the trial, the respondents herein made a motion for the Court to direct a verdict for them on various grounds, one of which was the fact that on November 11, 1903, when Whittren drew in his lines upon making a survey of his claim, he excluded his discovery hole, and although he made another discovery in December, 1903, prior to the respondent's location, he was then a deputy mineral surveyor and therefore disqualified to locate.

Upon this ground, the District Court of Alaska granted the motion and directed the jury to find for the respondents, who returned a verdict in accordance with such instruction (Tr., 90-97).

Upon writ of error sued out by your petitioners, the Circuit Court of Appeals for the Ninth Circuit affirmed the judgment of the lower Court upon the same grounds on which it had directed a verdict for the respondents.

In affirming the judgment of the lower Court, the Circuit Court of Appeals treated the case as though it were an adverse patent proceeding with the United States a silent party thereto, and declared the *prior* location of Whittren *void.*

Preliminary to such a decision, the said Circuit Court of Appeals found all the facts in favor of your petitioners as follows:

That Whittren had made a valid location in January, 1902; that he had a right in November, 1903, to draw in his lines to make that location conform to the statutory area; that when in so doing he left his discovery hole outside he lost one of the essentials of his location; *but that as no other rights had intervened,* the fact that he made another discovery in December, 1903, would have validated the location, were it not that he was, when the later discovery was made, a deputy mineral surveyor of the United States. That such fact disqualified him under the provisions of Section 452 of the Revised Statutes of the United States.

Upon that ground alone, and without any issue having been made on that point in the pleadings, in an action to try the relative possessory rights of two locators to a mining claim, wherein the United States is not a party the Circuit Court of Appeals declared the location of Whittren void, and rendered a judgment in favor of the respondents, although the discovery of Whittren in January, 1902, and his dis-

covery in 1903, were both prior in time to that of the said respondents and innocent persons had purchased.

ARGUMENT.

The case is one of peculiar hardship, involving equities which should be decided in favor of the petitioners if by any right process of legal reasoning they could be so decided.

The main legal question involved was said by the Circuit Court of Appeals for the Ninth Circuit, in deciding the motion to stay the mandate herein, pending the application for the writ of *certiorari,* to be a "most interesting and close one."

That question—whether a change in a location by the locator after he has been made a deputy mineral surveyor can be declared void by reason of the disqualification arising under Section 452 of the Revised Statutes of the United States, in an action by a private individual claiming under a later location, and without the intervention of the United States—has never been adjudicated by this or any other appellate tribunal.

This question is complicated in this case by the fact that when the location of the "Bon Voyage" was made by Whittren in January, 1902, at a time when he was not a deputy mineral surveyor, it was valid in all respects. This the Circuit Court of Appeals found.

And it further found that when he surveyed the ground and drew in his lines to conform to the law and thereafter made another discovery in 1903, his location was the only valid location of the ground and were it not for his then being a deputy mineral surveyor he would be entitled to prevail over the respondents who did not locate until 1904.

But found that as he was such deputy mineral surveyor at that time his location was void. (See Opinion, Tr. Addenda, p. 4.)

We contended in our application for a rehearing in the Circuit Court of Appeals, that its decision was therefore wrong in two respects, viz:

(1) In treating the action as though it were one wherein the United States was a party and on apparent inquest of office finding in favor of the government where it had not obtained jurisdiction over the government.

(2) In further imposing another penalty than that provided for by the statute and applying it to innocent purchasers.

We shall not attempt to do more within the limits of this brief than to refer cursorily to the primary proposition that a deputy mineral surveyor does not come within the provisions of Section 452, in that he is neither an officer, clerk nor employee in the General Land Office.

Admitting, argumentatively, that the Circuit Court of Appeals, holding the affirmative, in this respect, is correct, we shall confine ourselves to showing its error in the two other respects pointed out.

I.

The Circuit Court of Appeals exceeded its jurisdiction when it treated the case as though it were a proceeding of "inquest of office" and declared the location of a deputy mineral surveyor void, as the government was not even indirectly a party thereto.

Section 452 of the Revised Statutes does not declare a location made in violation of the statute *void*. Any such location if questionable at all, in that respect, is voidable only, and then at the instance of the Government alone.

The section of the Revised Statutes which has been construed by the Circuit Court of Appeals against the contention of your petitioners, reads as follows:

> "The officers, clerks and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public lands; and any person who violates this section shall forthwith be removed from his office."

The Circuit Court of Appeals held that our location was void because the locator, a deputy mineral surveyor, was an employee in the General Land Office when he made his second discovery, although this second discovery was prior in point of time to the initiation of any rights on the part of respondents.

The locator of the "Bon Voyage" and his innocent grantees base their rights upon their *possessory* title to the ground in controversy. They are not applying to the government to purchase the title to this land and to obtain evidence of such title in the nature of a patent, in a proceeding of practical inquest of office. None of the authorities cited by the Circuit Court of Appeals in its opinion bear out the views of that court, but on the contrary are in accord with our contention.

The rule invoked by the Court below anticipated nothing for the protection of the innocent grantees of Whittren, who took with no knowledge of the fact that he was disqualified, if such be a fact. The recorded notice of location showed that Whittren had located the ground in January, 1902. No record existed that Whittren had become disqualified to make a location when he transferred a half interest in his original location in 1905 to Eadie, nor when he and Eadie made the leases to Waskey and Crabtree in 1906, under which they at a large expenditure of money, time and energy developed the pay streak on

this ground. Everything on the record related to the location as originally made.

The Circuit Court of Appeals entirely overlooked this point in its opinion, and wiped out the rights of the innocent grantees of Whittren as well as those of Whittren himself upon a false premise, i. e., that his location was not voidable but void.

Our contention is this: Assuming that the Circuit Court of Appeals is correct in its views that a deputy mineral surveyor comes within the purview of the statute quoted (which we deny), yet that section nowhere declares a location made in violation of its provisions void. The only consequence of an infraction of the statute is a summary removal from office. But if by way of construction it can be laid down by the courts that a further penalty shall also attach in the nature of a forfeiture of the land also, then such forfeiture can only be declared by the government in a proper proceeding. Especially is this so as to innocent purchasers.

The question of whether a deputy mineral surveyor is debarred from making a mineral location has been passed upon by the courts in patent cases in which the United States is an ever present party and "office found" an issue, but then only twice, and that both *pro* and *con* by the Supreme Courts of the States of Utah and Nevada, in the cases of *Lavignino* vs. *Uhlig,* 71 Pac., 1046, and *Hand* vs. *Cook,* 92 Pac., 1.

It is true the case of *Lavignino* vs. *Uhlig* went to

the Supreme Court of the United States (198 U. S., 443). It is significant that this tribunal did not pass on the question, deciding the case upon other grounds, but assuming therein for the purpose of argument, that such an individual holding the position of deputy mineral surveyor was not debarred from making a location.

In commenting upon the cases of *Lavignino* vs. *Uhlig* and *Hand* vs. *Cook,* Professor Costigan in his recent work on mining law, takes the same position that we do in the case at bar, and makes the same point, which has never been adjudicated by the courts, and that is that no one but the government could question a location made by a deputy mineral surveyor.

He says at page 170 (referring to *Lavignino* vs. *Uhlig*):

> "This is but a State decision, for the United States Supreme Court, when the case came before it, avoided the point by basing its decision on the ground that the land was not open to location. *The whole tenor of the Utah decision is that the location by the deputy mineral surveyor is absoluty void, whereas the protection of innocent purchasers requires that a rule like that applicable to locations by aliens be applied.*"

And then, discussing *Hand* vs. *Cook,* goes on to say:

> "It is upon this ground only that a recent Nevada decision upholding a location by a deputy mineral surveyor can be supported. While the Court seems to have been in error in the last-mentioned case in saying that deputy United States mineral surveyors are not covered by the above-mentioned statute, *nobody but the government could possibly object to a location by a deputy mineral surveyor, and the Court was therefore right in its decision, but erred in the reason given for it.*" (Italics ours.)

Here is then clear non-partisan authority for our contention, that the principle involved is similar to that of the alien cases.

But we go further than Professor Costigan, and assert that giving to the case of *Lavignino* vs. *Uhlig* its full value, it is an argument in favor of our and his contention that the validity of such a location can only be questioned in an action where the government is a party. Professor Costigan lost sight of the fact that *Lavignino* vs. *Uhlig* was an adverse patent suit and in such cases the proceeding is a direct one for the procurement of the title of the United States to the ground and the United States was therefore a party to the proceedings in that case.

The cases cited by the Circuit Court of Appeals in its opinion in support of its reasoning apply only in litigation where the United States is a party. In all

proceedings for patent in the Land Office, where the officers of the United States have the power to hear and determine the rights of the parties, the United States is a party adverse to both the applicant and the contestant.

Necessarily it follows that in all proceedings before the courts on a contest of an application for patent, the parties are there from some branch of the General Land Office where the intervening third party, the United States, is always an ever present but silent litigant.

> *Billings* vs. *Aspen Mining & Smelting Co.*, 52 Fed., 251.

The case of *Prosser* vs. *Finn*, 208 U. S., 67, upon which the decision of the Circuit Court of Appeals is largely based, is dependent upon the principle we contend should control in this case. For therein the United States was a party to the original proceedings in the Land Office and necessarily with all other parties bound by its judgment.

We have no fault to find with the case of *Prosser* vs. *Finn* in this respect, however much we may differ with the conclusion of the Circuit Court of Appeals that a deputy mineral surveyor is an employee in the General Land Office of the same status as that of a special agent. The deputy mineral surveyor lacks the first essential of such employment—the rendition of services to the government for pay from the gov-

ernment. While the special agent is in the actual service of the United States, receiving his pay from it, the deputy mineral surveyor is in the service of the party who employs him to make a survey and is paid by him alone. He receives nothing from the United States.

Hand vs. *Cook, supra.*

But waiving that and to return to the facts of *Prosser* vs. *Finn:*

Prosser had made a timber land entry in the United States Land Office when in the employ of the United States as a special agent. His entry was there contested and that forum having jurisdiction, heard and determined his rights, and as the United States was a party to the proceedings, judgment was rendered against him. Long thereafter Prosser sued Finn, a subsequent patent grantee, from the United States, to declare Finn a trustee for him, upon the ground that the Land Office had wrongfully denied him (Prosser) his rights. Manifestly, Prosser had had his day in court. He had submitted to the jurisdiction of the Land Office with all parties in interest as litigants, and the United States had prevailed against him upon the principle of "office found."

Prosser vs. *Finn* is therefore not an authority against us here, but rather in our favor because the United States is not and never was a party in the case at bar.

The Alien Cases.

Our theory in this respect is supported in principle by all the cases wherein the question was raised with reference to locations made by aliens.

Section 2319 of the Revised Statutes declares that *only* citizens or those who have declared their intention to become such shall *locate* the mineral lands; while Section 452 says that no officer, clerk or employee in the General Land Office shall *purchase or become interested in the purchase* of the public lands.

In any case arising under the sections quoted, the questions involved must be considered and decided with reference to the exact language of the statute. This Court lays down this rule of procedure in the case of *Del Monte* vs. *Last Chance,* 171 U. S., 66-7, wherein it says the question for the court is "what saith the statute," and "beyond the terms of the statute courts cannot go."

Yet, notwithstanding this language this Court has decided in the alien cases, in the face of the statutory provision that only citizens can locate, that if aliens do locate no one can question the validity of the location but the sovereign on office found.

McKinley Creek Mining Co. vs. *Alaska United Mining Co.,* 183 U. S., 563;
Manuel vs. *Wulff,* 152 U. S., 505.

Says this court in the latter case:

> "We are of opinion on the record that as Alfred Manuel was a citizen if his location was valid his claim passed to his grantee, not by operation of law, but by virtue of his conveyance, *and that the incapacity of the latter to take and hold by reason of alienage was, under the circumstances, open to question by the government only.*"

And referring to this decision, the Supreme Court of the United States in the later case of *McKinley Creek Min. Co.* vs. *Alaska Min. Co., supra,* said:

> "The meaning of *Manuel* vs. *Wulff* is that the location by an alien and all of the rights following from such location *are voidable and not void, and are free from attack by anyone except the government.*"

In that case two of the locators of the mining claim in controversy were aliens.

This rule of law regarding the locations of aliens has been frequently cited in decisions following along the same lines, in both the Circuit Courts of Appeal and the courts of last resort of the States, and it is generally recognized now that notwithstanding the statute, aliens can make locations subject to this right of the government to question their validity.

Shamel on Mining, Mineral and Geological Law, p. 108;
Morrison's Mining Rights, 13th Ed., p. 308;

Lindley on Mines and Mining, Vol. 1, Sec. 233;
Martin's Mining Law, Sec. 98;
Costigan on Mines, pp. 167-8;
Snyder on Mines, Sec. 263;
McKinley Creek Mining Co. vs. *Alaska United M. Co.,* 183 U. S., 563;
Manuel vs. *Wulff,* 152 U. S., 505;
Shea vs. *Nilima,* 133 Fed., 209, 215;
Tornanses vs. *Melsing,* 109 Fed., 711;
Lone Jack M. Co. vs. *Megginson,* 82 Fed., 89;
Billings vs. *Aspen M. & S. Co.,* 51 Fed., 338; 52 Fed., 251.

Wherein lies the distinction then between an alien disqualified and a citizen disqualified? No harsher rule should be invoked by the government as against one of its own citizens than is applied to a foreigner. A foreign corporation cannot come into a State and do business on better terms than a resident corporation. Why should the sovereignty then permit an *alien* suffering from the inhibition of the statute, to hold a mineral location, until it chooses to question the right of the alien thereto, yet say that any private individual can question the right of a *citizen* laboring under a disqualification, who has the right given him by statute to make such location?

In the early case of *Governeur* vs. *Robertson,* reported in 11 Wheaton, 332, this court in discussing

the policy that permits the alien to hold real estate until an inquest of office found when the law expressly provides against such holding, says:

> "It no doubt owes its present authority, if not its origin, to regard to the peace of society and a desire to protect the individuals from arbitrary aggression."

This language was quoted approvingly by the Circuit Court of Appeals for the Eighth Circuit, with reference to a mining location made by an alien, in the case of *Billings* vs. *Aspen Mining & Smelting Co., supra.*

If it can be deemed an act of arbitrary aggression to disturb an alien locator in the possession of his claim, which the courts frown down upon in order to preserve the peace of society, is it not an arbitrary aggression upon the rights of a citizen of the United States, holding and possessing a valid location, for any subsequent locator to interfere with such location on the ground that he is suffering from a disqualification?

Surely the rule of preserving the peace of society should be invoked on the same terms in the one instance as in the other. It is equally applicable to both conditions.

Cases Arising Under the National Banking Acts.

There is a line of cases decided by the Supreme Court of the United States in which the principle controlling in the alien cases has been adopted and applied. We refer to those cases arising under the laws of the United States relative to the powers of the National Banks. In many of these cases, the banks have taken certain securities in the ordinary course of business in direct violation of the provisions of the Act of Congress.

But has this Court declared such securities void? On the contrary, it has uniformly held such securities enforceable by the banks, when their validity has been questioned by private persons, holding the same voidable and then *only at the instance of the government on office found.*

National Bank vs. *Matthews,* 98 U. S., 621, 627;
Oates vs. *National Bank,* 100 U. S., 239, 249;
National Bank vs. *Whitney,* 103 U. S., 102-3;
Reynolds vs. *Bank,* 112 U. S., 405;
Schuyler National Bank vs. *Gadsen,* 191 U. S., 451.

The early case of *National Bank* vs. *Matthews,* 98 U. S., 621, 627, is a leading case upon the point.

The National Banking Act provided that the banking associations created thereunder might purchase,

hold and convey real estate for certain purposes and no others. It further provided for the acquisition by the banking associations, of land at judgment sales and by several other methods, but especially prohibited the holding of any real estate under mortgage. Notwithstanding the prohibition of the statute, the Union National Bank of St. Louis took a mortgage upon certain real property to secure future advances. Upon an action brought to enjoin the sale by the bank under said mortgage, the power of the bank to accept such security was assailed and the contract alleged to be void. But the Supreme Court of the United States in holding the bank's power could not be attacked collaterally said:

> "The statute does not declare such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done instead of leaving the question to be settled by the uncertain result of litigation and judicial decisions . . . Where a corporation is incompetent to take a title to real estate, a conveyance to it is not void, but only voidable, *and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose.*" (Pages 627-8.) (Italics ours.)

There is a complete line of decisions of this court based upon the foregoing authority, down to that of the case of *Schuyler National Bank* vs. *Gadsen,* 191

U. S., 451, where this court, in approving the doctrine of *National Bank* vs. *Matthews, supra,* says:

> "It is no longer open to controversy that the provisions of the Statutes of the United States forbidding the taking of real estate security by a National Bank for a debt coincidently contracted do not operate to make the security void, and thus enable the individual who has contracted with the Bank to defeat recovery *but simply subject the bank to be called to account by the Government for exceeding its powers.*" Page 458.) (Italics ours.)

Foreign Corporation Cases.

The same principle is involved in another class of cases decided by this court wherein foreign corporations being forbidden to do business in a State or acquire property therein until they have complied with certain statutory requirements, violate the law in this respect.

In such cases this court has uniformly held that in the absence of any provision of the statute declaring contracts made in violation of the statute void, that no one can question their validity except the sovereignty on direct proceedings instituted for that purpose.

Fritts vs. *Palmer,* 132 U. S., 282;
Seymour vs. *Slide,* 153 U. S., 523.

The case of *Fritts* vs. *Palmer, supra,* is one much cited in the books.

There the question was whether a deed for real estate in Colorado made to a Missouri corporation organized to do business in the former State, but which had not filed in the office of the Secretary of State its articles of incorporation, was absolutely void, passing no title to the grantee. The statutes of Colorado had provided that no foreign corporation should purchase or hold real estate in the State unless in the manner provided by the Colorado laws, and further provided that upon failure to comply with the provisions relative to the filing of its articles, that each stockholder and officer should be liable jointly and severally on all contracts of the company while it was so in default.

The Supreme Court of the United States construing this section said:

> "The question whether a corporation having capacity to purchase and hold real estate for certain defined purposes or in certain quantities has taken title to real estate for purposes not authorized by law, or in excess of the quantity permitted by its charter, *concerns only the State within whose limits the property is situated. It can not be raised collaterally by private persons unless there is something in the statute expressly or by necessary implication authorizing them to do so.*" (Italics ours.)

In thus holding, the Supreme Court of the United States based its decision upon the fact that the principle involved was analogous to that raised in the alien cases, the National Banking cases and those cases arising out of the *ultra vires* acts of domestic corporations, in all of which it has been decided that only the government can complain.

Cases Arising Under Ultra Vires Acts of Corporations.

Similar to the foregoing cases are those expressly cited by the Supreme Court in support of the reasoning in the case of *Fritts* vs. *Palmer, supra,* wherein corporations organized to do business under State laws are authorized by the statute to hold only a limited amount of real property.

This court has settled the law that where a corporation violates the statute in this respect, no advantage of the fact can be taken by a private individual; that only the sovereignty can complain.

Cowell vs. *Springs Co.,* 100 U. S., 55, 60;
Jones vs. *Habersham,* 107 U. S., 174;
Blair vs. *City of Chicago,* 201 U. S., 450-1.

Cases Arising Under Indian Reservation Acts.

There is finally one other class of analogous cases involving the throwing open of certain lands of the United States theretofore reserved to Indians, such

lands to become open to settlers on a certain day at an hour stated; and wherein the proclamation of the President declaring such lands open to settlement contains an express prohibition against sooner entry under penalty of loss of power to acquire any right to said lands.

Notwithstanding such prohibition, this court has upheld locations made by individuals who violated the express provisions of the statute by entering before the hour stated, and held that while the entry of one disqualified was valid on its face, no one but the government through its land department could question the entry.

McMichael vs. *Murphy,* 197 U. S., 304;
Hodges vs. *Colcord,* 193 U. S., 192.

A case strongly in point as illustrative of this principle is that of *McMichael* vs. *Murphy, supra,* decided by this court a few years ago.

In that case the President under the Indian Appropriation Act of 1889 issued a proclamation declaring that certain lands on and after noon of April 22nd, 1889, *and not before,* should be open for settlement, etc., and further on in said proclamation used the following language: "Warning is hereby again "expressly given that no person entering upon and "occupying said lands before said hour . . . of "April 22, 1889, . . . will ever be permitted to "enter any of said lands or acquire any rights there-

" to; and that the officers of the United States will " be required to strictly enforce the provisions of the " Act of Congress to the above effect" (26 Stats., 1544, 1546). A man named White did enter and occupy *before* said time, in direct violation of both the Act of Congress and the President's proclamation; he, White, thereafter made an entry thereof in the Land Office. Subsequently, one McMichael entered the same land, and on contest for it the court said as follows:

> "Following the adjudged cases, we hold that White's original entry was *prima facie* valid, that is, valid on the face of the record, and McMichael's entry, having been made at the time when White's entry remained uncanceled or not relinquished of record, conferred no right upon him for the reason that White's entry, so long as it remained undisturbed of record, had the effect to segregate the lands from the public domain and make them not subject to entry. Upon White's relinquishment they again became public lands, subject to the entry made by Murphy."

To the same effect, that no rights can be incepted by a third party to land covered by a homestead entry, made by one disqualified in fact, until after such original entry is declared void by competent authority, is the case of *Hodges* vs. *Colcord, supra.*

We also cite to the court the following authorities from the Circuit Courts of Appeal and the courts of

last resort of the various States, in which the doctrine laid down by this court is adopted and followed in analogous cases:

Webber vs. *Spokane, etc.*, 64 Fed., 208;
Sanders vs. *Thornton*, 97 Fed., 863;
Brown vs. *Schlerer*, 118 Fed., 987;
Blodgett vs. *Lanyon Zinc Co.*, 120 Fed., 893;
Waterbury vs. *McKinnon*, 146 Fed., 737-9;
Dunlap vs. *Mercer*, 156 Fed., 545;
Newchatel vs. *New York*, 49 N. E., 1043;
Ledebuhr vs. *Wisconsin Trust Co.*, 88 N. W., 607, 609;
Meyers vs. *Campbell*, 44 Atl. (N. J.), 863;
Camp vs. *Land*, 122 Cal., 167.

The case of *Sanders* vs. *Thornton, supra,* while involving a somewhat different state of facts, is very pertinent. It appeared therein that a citizen of the United States, contrary to the statute, had knowingly purchased certain lands of a Cherokee Indian situate on the Cherokee domain, inducing the latter to use his name and hold the lands in trust, to evade the statute. Upon a suit in unlawful detainer, the point was made that such a purchase being in violation of the law was void, and an instruction to that effect was asked.

The Circuit Court of Appeals for the Eighth Circuit, in holding that such a purchase was not void, said:

"If the defendant was a citizen of the United States and for that reason was not entitled to hold lands and improvements thereon in the Cherokee Nation, these facts alone would not entitle the plaintiff to recover, as the instruction asked broadly asserts. Several other things would have to occur to entitle the plaintiff to oust the defendant. These facts might entitle the sovereign to oust the defendant but, *if the defendant was not entitled to hold lands or improvements thereon in the Cherokee Nation that is no concern of the plaintiff, and he can not profit by it in this action. The sovereign alone, either the United States or the Cherokee Nation, has the right to oust him of his possession or occupancy on that ground.*"

It would seem therefore that under the condition shown by the foregoing cases, until the United States has spoken, no third person can initiate any rights against one who has even gone so far as to *intentionally defy* the express prohibition of the statute.

Why, then, should an innocent duly qualified locator, after making a valid location, be subject to the attacks of every subsequent locator, whether *alien* or *citizen,* because a year and a half later, when he had become a deputy surveyor, he innocently drew in his lines and excluded the special bit of ground on which he had discovered gold? And this notwithstanding the fact that he made another discovery at a time when no rights of any kind had intervened.

What kind of a rule of law is it that would permit

an *alien* locating over this ground to set up, if he desired, the right to have the doctrine of "office found" applied upon any collateral question of his right to so locate, and the *citizen* locator to be denied the right of appealing to the government alone to question his disqualification upon an inquest of office? Yet such a condition is not at all an improbable one. It may exist here in this case unknown to your petitioners. We would then have a *prior valid* location by a *citizen,* superseded by a *subsequent* location by an *alien* in violation of the statute, simply because the one could invoke the doctrine of "office found" and the other could not.

Such is the anomalous condition to which this construction of the law by the decision in the case at bar would lead.

> "Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation leading to hardship and injustice, if any other interpretation is reasonably possible."
>
> *St. Louis & Iron Mountain Ry.* vs. *Taylor,* 210 U. S., 295.

And there is another unfortunate result flowing from such decision.

Suppose a deputy mineral surveyor desiring to avade the statute, employs some one to go out on the public domain and make a location of this or similar

ground, with the understanding that it is to be held in trust for him. The agent acts and makes the location. No notice is conveyed to the world that it is being done for a deputy mineral surveyor. If the location is void when made openly by the surveyor, it is surely void under the words of this statute—"directly or indirectly"—if made secretly under the guise of another's name.

Now then, assume a sale to innocent purchasers of the location. Under the decisions of the Circuit Court of Appeals they acquire no rights as against a subsequent (possibly alien) locator, because the location was void in its inception. What protection is there to be offered to innocent purchasers under this decision?

> "It is clear that a purchaser may be in a different position from the locator of the claim, not as against the general government, with which nothing can avail but a strict compliance with the law regulating locations, *but as against other citizens seeking to locate the same ground.* It may be well said that a purchaser in possession under a conveyance regular in form, is in by color of title, which, in time, under the statute of limitations, will ripen into a perfect right, and it seems reasonable to allow him to maintain his position and his right as against one who seeks only to initiate a new claim to the same thing. In doing so, the regulations respecting locations are not at all relaxed, nor is any condition on which the estate

is held set aside. A presumption is indulged that the location was regularly made in the first place, and the party in possession is allowed to remain so long as he shall comply with the conditions on which he holds the estate."

Harris et el. vs. *The Equator Mining & Smelting Co.*, 8 Fed., 863.

And how is this decision to be reconciled with that of the Circuit Court of Appeals for the Eighth Circuit, in *Sanders* vs. *Thornton, supra?* The principle controlling is identical. The ground belongs to the sovereignty in each case; certain persons are disqualified to purchase in each case; both violate the provisions of the statute.

"But only the government can complain," says the Circuit Court of Appeals for the Eighth Circuit; and "anyone can complain," says the Circuit Court of Appeals in the case at bar.

We submit that the decision of *Sanders* vs. *Thornton* exhibits the true rule which should have controlled in this case, as it expresses the principle governing in all of the decisions of this court in analogous cases.

If only for the protection of innocent purchasers the investigation into the validity of such a location as the one at bar should be left to the government alone.

II.

The Circuit Court of Appeals exceeded its juristion when it imposed a penalty other than and in addition to that declared by the statute and applied it to innocent purchasers.

Admit that the Circuit Court of Appeals was correct in its conclusions respecting a deputy mineral surveyor, coming within the provisions of Section 452, and admit that the class of individuals mentioned therein are prohibited from exercising the right to make a purchase of the public lands while in the General Land Office, what is the express effect of a violation of such prohibition as expressed in the statute? The same statute creating the offense provides in terms the punishment for its infraction.

"Any person who violates this section *shall forthwith be removed from office.*"

There is no provision that any such purchase shall *be void.*

The law is well settled that where a statute *creates a new offense* and *denounces the penalty* or gives a new right and declares the remedy, the punishment or the remedy can only be that which the statute prescribes.

Sutherland on Stat. Const., Sec. 327;
Endlich on Interpretation of Stats., Sec. 397;
Oates vs. *National Bank*, 100 U. S., 239, 249;

Fritts vs. *Palmer*, 132 U. S., 282;
Seymour vs. *Slide*, 153 U. S., 523;
Barnet vs. *National Bank*, 98 U. S., 558;
National Bank vs. *Whitney*, 103 U. S., 102-3;
National Bank vs. *Matthews*, 98 U. S., 621, 627;
DeWolf vs. *Johnson*, 10 Wheaton, 392;
Martin vs. *United States*, 168 Fed., 198, 201;
Pratt vs. *Short*, 79 N. Y., 437, 445;
Behan vs. *The People*, 17 N. Y., 517;
Bird vs. *Dennison*, 7 Cal., 308;
Perkins vs. *Thornburg*, 10 Cal., 190.

The persons mentioned in Section 452 have a statutory right as *individuals* to purchase the public lands. They also have the right as individuals, to accept employment from the government in the General Land Office. If they accept such employment the right to exercise such statutory power to purchase the public lands is withdrawn during the period of such employment. If they persist in exercising such power in violation of the statute, while so employed, then they must pay the penalty and forfeit their employment.

The proposition it seems to us is an alternative one. Congress says to these individuals, "you can retain " your employment if you do not exercise your statu- " tory power to make a purchase of the public lands; " but if you do exercise this power, then you must

" face the consequences—loss of employment by the " government."

We submit this is the only reasonable construction of the statute, and does not work so harsh a rule as has been invoked by the court in this case, i. e., loss of employment (the penalty which the statute prescribes) and loss of location at the same time.

Where the express liability imposed by Congress for an infraction of this law is the loss of employment the court must presume that Congress believed this sufficient to insure an observance of the limitation imposed upon the persons mentioned in the statute, in the exercise of their right as individuals to make a location of the public mineral lands.

The statute imposes a forfeiture of employment; the Circuit Court of Appeals imposes also a forfeiture of property. In either event, the statute is a penal one and therefore to be strictly construed.

"That penal laws are to be strictly construed" (said Chief Justice Marshall) "is perhaps not much older than construction itself."

United States vs. *Wiltberger,* 5 Wheat. (U. S. 95).

In the case of *Oates* vs. *National Bank,* 100 U. S., 239, 249, where one of the questions was whether a bank could be deemed a *bona fide* holder of a note, having received it under a contract which in its execution involved a violation of the usury laws of the

State, and the statute providing for a forfeiture of the interest on such contracts, the Supreme Court of the United States in discussing this very point say:

> "The statute under which the bank was organized, known as the National Banking Act, does not declare the contract under which the usurious interest is to be paid to be *void.* It *denounces no penalty other than a forfeiture of the interest which the note or bill carries,* giving to the debtor the right to sue for and recover twice the amount of interest so paid. *If we should declare the contract of indorsement void, and consequently that no right of action passed to the bank, on the note transferred as collateral security, an additional penalty would thus be added beyond those imposed by the law itself."* (Italics ours.)

So, too, in the case of *Fritts* vs. *Palmer, supra,* a similar question was passed upon by this court, relative to the penalty provided for an infraction of the Colorado statute regarding foreign corporations complying with certain provisions thereof before the right to hold real estate would attach and wherein this court says:

> "The constitution and laws of Colorado, it should be observed, do not prohibit foreign corporations altogether from purchasing or holding real estate within its limits. They do *not declare absolutely or wholly void* as to all persons and for every purpose, a conveyance of real estate to a

foreign corporation, which had not previously done what is required before it can rightfully carry on business in the State. Nor do they declare that the title to such property shall remain in the grantor despite his conveyance.

"So far as we are aware, the only penalty imposed by the statutes of Colorado upon a foreign corporation carrying on business in the State before acquiring the right to do so, is found in Section 262 of the same chapter . . . *The fair implication is that, in the judgment of the Legislature of Colorado, this penalty was ample to effect the object of the statutes prescribing the terms upon which foreign corporations might do business in that State. It is not for the judiciary at the instance of or for the benefit of private parties claiming under deeds executed by the person who had previously conveyed to the corporation, according to the forms prescribed for passing title to real estate, to inflict the additional and harsh penalty of forfeiting for the benefit of such parties, the estate thus conveyed to the corporation and by it conveyed to others.*" (Italics ours.)

We may say with reference to the decision of the Circuit Court of Appeals in the case at bar, as was said by the Supreme Court of the United States in the early case of *De Wolf* vs. *Johnson,* 10 Wheaton, 392, "on what principle could this court add another to the penalties declared by the law itself?"

We submit no such power exists in the Circuit Court of Appeals or in any other court. The power

of the courts is limited to the enforcement of the law as it is written.

We have not heretofore within the foregoing argument, done more than to casually refer to our position upon the question of the actual disqualification of a deputy mineral surveyor under the provisions of Section 452 to make a mineral location.

We contended before the Circuit Court of Appeals that such surveyor was not disqualified under the statute because by no means could he be considered either an officer,

Hand vs. *Cook,* 92 Pac., 3;
U. S. vs. *Hartwell,* 6 Wall., 385;
U. S. vs. *Germaine,* 99 U. S., 508;
U. S. vs. *Moluat,* 124 U. S., 303, 307;
U. S. vs. *Smith,* 124 U. S., 525, 532;
Martin vs. *U. S.,* 168 Fed., 198;

a clerk,

People vs. *Fire Comm.,* 73 N. Y., 437, 442;
People vs. *ex rel Satterlea* vs. *Board of Police Comm.,* 75 N. Y., 38;
Hand vs. *Cook, supra;*

nor an employee,

McCluskey vs. *Cromwell,* 11 N. Y., 593;
U. S. vs. *Meigs,* 95 U. S., 748;
Ex parte Burdell, 32 Fed., 681;

Powell vs. *U. S.*, 60 Fed., 689, 690;
U. S. vs. *Macdonald*, 72 Fed., 898;
Louisville E. & St. L. R. Co. vs. *Wilson*, 138 U. S., 501, 505;
Auffmordt vs. *Hedden*, 137 U. S., 310;
Pack vs. *The Mayor, etc., of N. Y.*, 8 N. Y., 222;
Kelly vs. The Mayor of N. Y., 11 N. Y., 432;
The People ex *rel Peter Morris* vs. *Randall*, 73 N. Y., 41;
Blake vs. *Ferris*, 5 N. Y., 58,

in the General Land Office.

Our position with reference to the inapplicability of Section 452 to the so-called office of a deputy mineral surveyor is summed up by the Supreme Court of Nevada in the case of *Hand* vs. *Cook, supra*, p. 9, where that court say:

> "Deputy mineral surveyors are appointed without limit and for no particular time by the surveyor general of the United States under the provisions of Section 2334, Rev. St., *supra*. They are not required to keep an office at any particular place or at all. They do not remain under the direction or supervision of the surveyor general. They are not obliged to perform any service either for the government or any individual. They are simply persons who have been designated as having the requisite qualifications to make a proper

survey of a mining claim. If they perform any services at all, it must be as a matter of private contract between themselves and the mining claimant. They receive no salary or compensation whatever from the government; nor does the government supply them with instruments or assistants while engaged in making a mineral survey. They have no access to the official records of the surveyor general's office other than that afforded any private citizen. A deputy mineral surveyor may never make a survey after his appointment or he may make fifty or more in a year. The duties of a mineral surveyor are exclusively professional, and in no sense those of a clerk. He keeps no records or accounts, he registers no acts of a superior. He has no custody of public property or papers. His duties consist, when employed by the owner of a mining claim, in making for such owner a survey thereof showing improvements thereon with preliminary plat and field notes of survey. When the field notes and preliminary plat of survey have been filed with the surveyor general, his duty is ended, except it be to correct an error made by him."

We therefore submit that a deputy mineral surveyor bears no relation to the United States, as an officer whose term "embraces the idea of tenure, duration, emolument and duties" (*United States* vs. *Hartwell,* 6 Wall., 385), all of which elements are singularly lacking with respect to a deputy mineral surveyor.

He can not be said to be a clerk, for he keeps no registers or accounts, nor has he the custody of any books or property belonging to the public or to any person by whom he is employed. His duties simply consist when surveying a claim in preparing a plat and field notes. When these notes and plat are filed in the surveyor general's office, all connection with him is at an end, unless perhaps to correct any error that he may have made therein. His duties are strictly professional, and in no sense could they be declared those of a clerk either in the General Land Office or otherwise.

It was held in the case of *People* vs. *Fire Commissioners of City of New York*, 73 N. Y., 437, 442, that:

> "In its popular sense 'clerks' denotes those whose duties are clerical and they may be very various. The term does not include every employee and subordinate of the department. A clerk in an office is defined to be a person employed in an office, public or private, for keeping records or accounts, whose business is to write or register in proper form the transactions of the tribunal or body to which he belongs; and persons employed to assist as a surveyor in the execution of the laws regulating the storage, sale and use of combustibles and assist the fire marshal in the investigation of the cause of fires, are not clerks within the meaning of the charter. Their duties are not clerical in any sense."

A mineral surveyor receives no compensation from the United States of any kind or character, neither salary nor wages (Section 2334, R. S. U. S.). He is therefore not an employee of the government. Unless the government is to pay him originally, or to pay him in default of his receiving his compensation from those who do employ him, he can not be said to be an employee of the government. The word employee implies continuity of service, and it surely can not be applied to one who neither receives compensation, nor renders service.

Says the Supreme Court of the United States in the case of *Louisville E. & St. L. R. Co.* vs. *Wilson,* 138 U. S., 501, 505:

> "The term 'officers' and 'employees' both alike refer to those in regular and continual service. Within the ordinary acceptation of the terms, one who is engaged to render service in a particular transaction is neither an 'officer' nor an 'employee.' They imply continuity of service and exclude those employed for a special and single transaction. An attorney of an individual retained for a single suit is not his employee. It is true he is engaged to render services but his engagement is rather that of a contractor than that of an employee."

We submit that the relation which a deputy mineral surveyor bears to the United States is simply that of a licensee, his duties being merely transient

and casual. The case of *Hand* vs. *Cook, supra,* therefore expresses the correct principle of law. Opposed to this decision as we have heretofore shown, is that of the Supreme Court of the State of Utah in *Lavignino* vs. *Uhlig, supra.*

The decision in the case at bar is final. It also presents one of the conditions, the existence of which influences this court in issuing the writ of *certiorari* to review the action of the Circuit Courts of Appeal. We understand that this court is averse to exercising that power except in certain specified instances, one of which is "the necessity of avoiding conflict be-" tween two or more courts of appeal or between " courts of appeal and the courts of a State" (*Forsythe* vs. *Hammond,* 166 U. S., 514). That condition exists here.

And furthermore, we maintain that the conditions in this case, in other respects are most favorable to the issuance of the writ of *certiorari* by this court.

We have shown that the Circuit Court of Appeals exceeded its jurisdiction in rendering a judgment in favor of the United States herein, without ever having obtained jurisdiction over the government, as it was not a party even indirectly to the action. The Circuit Court of Appeals has therefore arrogated to itself the unwarranted power to "intervene" the United States herein, and thus convert a simple possessory action into an inquest of office on the part of the government itself.

The Circuit Court of Appeals has further transcended its powers by imposing upon the petitioners herein a penalty other than and in addition to that declared by the statute.

For all of which reasons as well as for the peculiar hardship flowing to your petitioners from the unusual circumstances surrounding the facts in this case (which facts we contend should modify the strict application of the statute herein, if applicable at all), we ask that this court grant our petition and issue the writ.

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